**Nos. 21-0978 & 21-1039**

# In the Supreme Court of Texas

THE LILITH FUND FOR REPRODUCTIVE EQUITY,
*Petitioner*,
*v.*
MARK LEE DICKSON AND RIGHT TO LIFE EAST TEXAS,
*Respondents.*

On Petition for Review
from the Seventh Court of Appeals, Amarillo

MARK LEE DICKSON AND RIGHT TO LIFE EAST TEXAS,
*Petitioners*,
*v.*
THE AFIYA CENTER AND TEXAS EQUAL ACCESS FUND,
*Respondents.*

On Petition for Review
from the Fifth Court of Appeals, Dallas

## BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE

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## Table of Contents

## Index of Authorities

Page(s)

**Cases:**

**Constitutional Provisions, Statutes and Rules:**

**Other Authorities:**

## Statement of the Interest of Amicus Curiae

Reversing nearly fifty years of precedent, the Supreme Court in *Dobbs v. Jackson Women's Health Organization* returned the issue of abortion to the people and their elected representatives. 142 S. Ct. 2228, 2279 (2022). The debate surrounding abortion has, therefore, taken on added significance as States are now free to determine the circumstances in which abortion will be legal. Consequently, Texas has an interest in ensuring that all views on abortion are heard and that its courts are not used to silence those who believe abortion amounts to the murder of an unborn child.

No fee was paid or will be paid for the preparation of this brief.

**To the Honorable Supreme Court of Texas:**

In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court "banish[ed] the issue [of abortion] from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight"—the legislative branch. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1002 (1992) (Scalia, J., concurring in the judgment in part). But no more. Earlier this year, that Court returned the issue to the people and their elected representatives. *Dobbs v. Jackson Women's Health Org.,* 142 S. Ct. 2228, 2279 (2022). Proponents and opponents of abortion may now have the "satisfaction of a fair hearing and an honest fight" through the legislative process.

In these cases, however, supporters of abortion rights are asking this Court to require advocates for unborn life to debate with one rhetorical hand tied behind their backs. They cannot say what they believe: abortion is murder. Indeed, the plaintiff organizations go so far to argue that, because Dickson and Right to Life East Texas (collectively, Dickson) believe what they say, they deserve less constitutional protection than those who utter opinions that they do not believe. Free-speech principles and the law of defamation do not permit that result. This Court should not, either.

That *Roe* declared Texas prohibitions on abortion unconstitutional is no barrier to ruling for Dickson. *Roe* did not limit speech, and the position that abortion is murder, while sharply stated, reflects the belief of many that abortion wrongly ends an unborn life. That position is supported by facts about human development, the nature of abortion, other laws protecting unborn life, and precedent. Accordingly, the

plaintiff organizations cannot prove, and the Court should not declare, that Dickson's statements are verifiably false. Moreover, Texas's pre-*Roe* statutory prohibitions remain in effect and are not unconstitutional under the United States or Texas Constitutions. Dickson stood on firm ground when he made the challenged remarks.

The Seventh Court of Appeals got it right, *Dickson v. Lilith Fund for Reprod. Equity*, 647 S.W.3d 410 (Tex. App.—Amarillo 2021, pet. granted), and the Fifth Court of Appeals got it wrong, *Dickson v. Afiya Ctr.*, 636 S.W.3d 247 (Tex. App.—Dallas 2021, pet. granted). The Court should hold in favor of free-speech principles, affirm the judgment of the Seventh Court, and reverse the judgment of the Fifth Court.

## ARGUMENT

### I. Principles of Free Speech Require the Court To Reject Attempts To Limit Speech About Abortion.

Both Texas and the United States have made constitutional commitments to freedom of speech. U.S. Const. amend. I; Tex. Const. art. I, § 8. But that freedom "necessarily end[s] when supervision by a court of equity of the expressions and sentiments of the individual is allowed to begin." *Ex parte Tucci*, 859 S.W.2d 1, 5 (Tex. 1993) (orig. proceeding) (quoting *Strang v. Biggers*, 252 S.W. 826, 826 (Tex. App.—Dallas 1923, no writ)). As this Court has explained, "[w]hatever is added to the field of libel is taken from the field of free debate." *Neely v. Wilson*, 418 S.W.3d 52, 60 (Tex. 2013) (alteration in original) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964)).

These cases attempt to remove "from the field of free debate" the view that abortion is the murder of an unborn child. This is not the first time those who support

abortion rights have attempted to silence their opposition. The Court should not countenance these tactics but hold that all views on abortion—no matter how controversially stated—are permissible in public debate.

### A. The speech clauses of the United States and Texas Constitutions ensure the right to debate all issues, including abortion.

**1.** Protecting free speech ensures the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *N.Y. Times*, 376 U.S. at 269 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). Indeed, it is a "fundamental principle of our constitutional system" to maintain free and open debates so that "government may be responsive to the will of the people." *Stromberg v. California*, 283 U.S. 359, 369 (1931).

Such debates are not always conducted with polite, gracious, or inoffensive language. *See Bridges v. California*, 314 U.S. 252, 270 (1941) ("[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste."). But the First Amendment protects "vigorous advocacy." *NAACP v. Button*, 371 U.S. 415, 429 (1963). And there is a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 154 (Tex. 2004) (quoting *N.Y. Times*, 376 U.S. at 270). Thus, in public debate, citizens must "tolerate insulting, and even outrageous, speech in order to provide 'adequate breathing space to the freedoms protected by the First Amendment.'" *Boos v. Barry*, 485 U.S. 312, 322 (1988) (quoting *Hustler Mag., Inc. v. Falwell*, 485 U.S. 45, 56 (1988)).

**2.** Few issues engender such sharply worded public debate as that of abortion. From *Roe* to *Dobbs*, the Supreme Court has always noted the "vigorous opposing views" and the "deep and seemingly absolute convictions that the subject inspires." *Roe*, 410 U.S. at 116; *see also Stenberg v. Carhart*, 530 U.S. 914, 947 (2000) (O'Connor, J., concurring) ("The issue of abortion is one of the most contentious and controversial in contemporary American society."). To this day, "Americans hold sharply conflicting views" on abortion. *Dobbs*, 142 S. Ct. at 2240.

Polling—both recent and historic—confirms that Americans are deeply divided on this issue. *See, e.g.*, Gallup—Abortion, https://news.gallup.com/poll/1576/abortion.aspx. Thus, even though the *Casey* plurality opinion "call[ed] the contending sides of a national controversy to end their national division," 505 U.S. at 867, it recognized that "[m]en and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage," *id.* at 850.

Consistent with the free-speech principles articulated above, "both sides of the debate deserve respect." *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 283 (5th Cir. 2019) (Ho, J., concurring). Indeed, when discussing late-term abortions, the Supreme Court concluded that "[t]he State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion." *Gonzales v. Carhart*, 550 U.S. 124, 160 (2007).

This Court should continue to advance the dialogue surrounding abortion by allowing the debate, which has more significance now that *Dobbs* returned the issue to the people, to be open and unimpeded.

### B. Abortion advocates have attempted to limit the speech of those who disagree with them.

Given the power of speech and information, abortion-rights supporters have often sought to limit the speech of those who oppose abortion. From challenges to informed-consent laws to buffer zones to pleas to private entities, proponents of abortion rights have sought to prohibit pro-life arguments and even the dissemination of factual information that might weaken their position.

Informed-consent laws, for example, require the provision of truthful, non-misleading information to a woman considering abortion so she can "evaluate her condition and render her best decision under difficult circumstances." *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 579 (5th Cir. 2012). Yet in *Casey*, abortion providers challenged a law requiring them to inform the woman of the health risks of abortion and gestational age of the child. 505 U.S. at 881 (plurality op.). They also objected to having to tell women merely of the *availability* of state-created materials providing information about medical assistance for childbirth, child support, and adoption. *Id.* Several years ago, the plaintiff organizations joined with others in challenging Texas's entire informed-consent regime, which required informing women of such basic facts as the physician's name, the risks of the abortion procedure, the existence of medical-assistance benefits for prenatal and neonatal care, and the father's child support obligations. Compl. ¶ 116, *Whole Woman's*

*Health All. v. Paxton*, No. 1:18-CV-00500-LY (W.D. Tex. June 14, 2018) (challenging Texas Health and Safety Code section 171.012(a)).

Abortion protestors and sidewalk counselors have also endured attempts to silence their views. In a case it has since described as having "distorted First Amendment doctrines," *Dobbs*, 142 S. Ct. at 2276 & n.65, the Supreme Court upheld a Colorado law that prohibited approaching within eight feet of any individual without her consent who was within 100 feet of a health-care facility for the purpose of speaking to her or handing her a pamphlet. *Hill v. Colorado*, 530 U.S. 703, 707 (2000); *id.* at 715 (noting that legislative history revealed that the law was motivated by activity outside of abortion clinics). Justice Kennedy lamented that "[f]or the first time, the Court approve[d] a law which bars a private citizen from passing a message, in a peaceful manner and on a profound moral issue, to a fellow citizen on a public sidewalk." *Id.* at 765 (Kennedy, J., dissenting); *see also id.* at 741-42 (Scalia, J., dissenting) (referring to the decision as an "assault upon [abortion opponents'] individual right to persuade women contemplating abortion that what they are doing is wrong").

Those offering to assist with respecting unborn life have also faced efforts to silence them. After Catholic bishops pledged to bury fetal remains at no cost in accordance with a Texas law requiring the respectful treatment of such remains, abortion providers demanded extensive discovery of the bishops' internal communications—but offered to withdraw their demands if the bishops' spokesperson agreed not to testify. *Whole Woman's Health v. Smith*, 896 F.3d 362, 365-67 (5th Cir. 2018); *see also id.* at 376 (Ho, J., concurring) ("They leave this Court to wonder if this discovery is sought, *inter alia*, to retaliate against people of faith for not only believing

in the sanctity of life—but also for wanting to do something about it."). And national politicians have asked Google to ensure that crisis pregnancy centers—organizations that provide alternatives to abortion—do not show up in online searches about abortion. Letter, https://ago.mo.gov/docs/default-source/press-releases/state-attorneys-general-letter-to-google-july-21-2022.pdf?sfvrsn=1baff1e1_2.

Even the media is a target. After *Dobbs*, over 600 abortion providers and advocates wrote an open letter to the media asking them to stop interviewing "anti-abortion extremists" because "abortion is not in the realm of theory or opinion." Letter from Physicians for Reproductive Health, https://prh.org/wp-content/uploads/2022/08/Media-Security-Letter-Final-8.15.pdf. They then offered their time to reporters to engage in "closed-room discussions on how to better your editorial and coverage strategies." *Id.*

The lawsuits before this Court are just the latest attempts to control speech about abortion and unborn life. But the United States and Texas Constitutions protect the expression of all viewpoints. The Court should give force to those principles when considering the merits of these appeals and reject the plaintiff organizations' attempts to control the terms of the abortion debate.

## II. Asserting That Abortion Is Murder Is Not Actionable Defamation.

The basic question in each of these cases is whether the assertion that abortion is murder is a false statement of fact. *E.g.*, Lilith Fund Pet. Br. 4; Dickson Pet. Br. xii. The parties treat this question as if it can be answered solely by determining whether abortion was a prosecutable crime under Texas law at the time of Dickson's speech. Indeed, that was the question asked and answered by the Seventh Court of

Appeals. *Afiya Ctr.*, 636 S.W3d at 257 (asking whether it could "verify the status of the law as to a particular offense at the time of a particular statement").

Texas offers a different possibility here—one that does not turn on specific legal doctrines, but on the perception of a reasonable person who understands the speech is part of the debate about abortion. *See Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 115 (Tex. 2000). And as the Fifth Court of Appeals properly held, "a person of reasonable intelligence and learning, and who uses care and prudence in evaluating circumstances" would not believe Dickson was accusing anyone of a criminal act. *Lilith Fund*, 647 S.W.3d at 412.

In the context of the debate surrounding abortion, references to murder indicate a belief that abortion ends the life of an unborn child, regardless of whether anyone can be prosecuted for it. And as facts about human development, the nature of the abortion procedure, other laws, and precedent demonstrate, that belief is reasonable, widespread, and sincerely held. Expression of that belief, even in sharply worded terms, is not a verifiably false statement of fact and cannot form the basis of a defamation claim.

### A. To survive a motion to dismiss, the statement that abortion is murder must be verifiably false.

**1.** The Texas Citizens Participation Act "protects citizens who petition or speak on matters of public concern from retaliatory lawsuits that seek to intimidate or silence them." *In re Lipsky*, 460 S.W.3d 579, 584 (Tex. 2015); *see* Tex. Civ. Prac. & Rem. Code § 27.002. It implements the freedom of speech guaranteed in both the United States and Texas Constitutions.

Because there is no question that the TCPA applies in these cases, the first hurdle the plaintiff organizations must overcome is "establish[ing] by clear and specific evidence a prima facie case for each essential element of the claim in question." Tex. Civ. Prac. & Rem. Code § 27.005(c). Here, that claim is defamation, which requires evidence that (1) Dickson published a false statement of fact, (2) that was defamatory concerning the plaintiff organizations, (3) with the requisite degree of fault, and (4) caused damage. *In re Lipsky*, 460 S.W.3d at 593. The plaintiff organizations cannot establish even the first element—that the challenged publications included a false statement of fact.

To support a claim of defamation, a defamatory statement must be *verifiably* false. *Neely*, 418 S.W.3d at 62 ("[S]tatements that are not verifiable as false cannot form the basis of a defamation claim.") (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21-22 (1990)). And even a verifiably false statement is not actionable if, when considered in context, it is "merely an opinion masquerading as fact." *Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 639 (Tex. 2018). "A statement that fails either test—verifiability or context—is called an opinion." *Id.* at 638. The expression of an opinion is constitutionally protected, Tex. Const. art. I, § 8, and opinions cannot form the basis of a defamation claim, *Dallas Morning News*, 554 S.W.3d at 638.

An allegedly defamatory publication is construed "as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it." *D Mag. Partners, LP v. Rosenthal*, 529 S.W.3d 429, 434 (Tex. 2017) (quoting *Turner*, 38 S.W.3d at 114). Thus, whether a publication is true, false, or a

statement of opinion depends not on a technical analysis of each statement, but rather on a reasonable person's perception of the entire publication. *New Times*, 146 S.W.3d at 154; *Bentley v. Bunton*, 94 S.W.3d 561, 579 (Tex. 2002). Whether a statement is a non-actionable opinion is a question of law. *Scripps NP Operating, LLC v. Carter*, 573 S.W.3d 781, 794-95 (Tex. 2019).

**2.** As the parties and lower courts have explained, the challenged statements came in the context of the City of Waskom's adoption of an ordinance that made it unlawful to perform elective abortions within Waskom. Lilith Fund Pet. Br. App.47. That ordinance also declared that organizations that assist women in obtaining abortions are "criminal organizations" and listed those organizations, including the plaintiff organizations. Lilith Fund Pet. Br. App.47.

After that ordinance was adopted, Dickson (a proponent of the ordinance) made several statements that have been challenged as defamatory. Some of those statements are that the plaintiff organizations (and others) "are now declared to be criminal organizations in Waskom, Texas," Dickson Pet. Br. 10 (June 11 Facebook post) and "are listed as criminal organization in Waskom, Texas," Lilith Fund Pet. Br. App.35 (July 2 Facebook post). But statements that the plaintiff organizations were "declared" or "listed" as "criminal organizations" are not defamatory because they are true—that is, in fact, what the Waskom Ordinance did. Lilith Fund Pet. Br. App.47. The plaintiff organizations may disagree with Waskom's declaration but merely describing what Waskom did is not false. Thus, the plaintiff organizations

cannot establish a prima facie case of defamation with respect to those statements. *See In re Lipsky*, 460 S.W.3d at 593.[1]

The majority of the challenged statements reflect Dickson's position that abortion is murder and that, by advocating for and assisting women with obtaining abortions, the plaintiff organizations advocate for, are involved with, and help with the murder of unborn children. *E.g.*, Lilith Fund Pet. Br. App.35-36 (July 2 and November 26 Facebook posts). But, as discussed below, the statement that abortion is murder is not verifiably false and cannot form the basis of a defamation claim.

### B. The assertion that abortion is murder is not a verifiably false statement of fact.

The parties have proceeded as if the truth or falsity of Dickson's statements should be determined by reference to legal codes. But context matters. And in the context of the abortion debate, the claim that abortion is murder often refers to the belief that abortion kills an unborn child, regardless of whether anyone can be prosecuted for it.

Considered not in the context of criminal law, but as a belief about the nature and value of unborn life, Dickson's statements are not verifiably false. Factors such

[1] The plaintiff organizations suggest that the Waskom ordinance itself is defamatory. *E.g.*, Lilith Fund Pet. Br. App.32-33. Even assuming an ordinance can be the subject of a defamation suit, the plaintiff organizations did not sue the Waskom City Council. That Dickson may have proposed the ordinance does not make the final ordinance his speech. *Accord Mazurek v. Armstrong*, 520 U.S. 968, 973 (1997) (per curiam) (finding it irrelevant that a pro-life group proposed the challenged statute in undue-burden challenge).

as human development, the nature of the abortion procedure, state laws protecting unborn life, and court precedent, all demonstrate that it is reasonable to equate abortion with the taking of life. At the very least, they preclude a holding that Dickson's statements are verifiably false.

**1. The word "murder" includes more than criminal violations.**

The reasonable person is undoubtedly aware that the debate about abortion goes beyond criminal law. As the *Roe* Court recognized, for many, the question of abortion is not answered by reference to specific legal codes, but to science, experience, philosophy, moral standards, and religion. 410 U.S. at 116. The use of the word "murder" is likewise not limited to specific legal codes defining degrees of homicide but includes the broader concept of killing other human beings.

One dictionary defines "murder" as "[t]he killing of another person without justification or excuse," "[t]o kill brutally or inhumanly," and also "the crime of killing a person with malice aforethought." *Murder*, The American Heritage Dictionary of the English Language (5th ed. 2016). Another refers to it as a crime ("the crime of killing a person esp[ecially] with malice aforethought") but also more generally ("to slaughter wantonly" and "to put an end to"). *Murder*, Merriam-Webster's Collegiate Dictionary (11th ed. 2014). And Black's Law Dictionary defines "murder" as "[t]he killing of a human being with malice aforethought." *Murder*, Black's Law Dictionary (11th ed. 2019). Thus, while murder can refer to a specific criminal violation, *e.g.*, Tex. Penal Code ch. 19, it also refers more generally to the deliberate killing of another human being.

In the context of the abortion debate, it is not unusual for members of the public to use the term "murder" with respect to abortion, even when *Roe* prohibited States from treating it as such. For example, the signs held by protestors in *Madsen v. Women's Health Center, Inc.*, included "Abortion Kills Children" and "Abortion: God Calls It Murder." 512 U.S. 753, 787 (1994) (Scalia, J., concurring in the judgment in part). And in public testimony before the Texas Legislature, members of the public have described abortion as murder. *E.g.*, Hearing on S.B. 1 Before the S. Comm. on Health & Human Servs., 83d Leg., 2d C.S. (July 8, 2013), *available at* https://tlcsenate.granicus.com/MediaPlayer.php?view_id=9&clip_id=495 (testimony at 5:06:10-21, 5:49:51-55, 6:08:45-55, 7:16:08-25). The Seventh Court of Appeals identified multple other instances in which people referred to abortion as murder. *Lilith Fund*, 647 S.W.3d at 416 n.5.

In a defamation suit not unlike this case, an Illinois court concluded that a "Wanted" poster that described an abortion provider's "prenatal killings" was not "objectively capable of being proven or disproven." *Van Duyn v. Smith*, 527 N.E.2d 1005, 1007, 1014 (Ill. App. Ct. 1988). Although the abortion provider urged that "killing" referred to a "criminal offense," *id.* at 1013, the court disagreed, concluding instead that, in context, the word "killing" was "commonly understood as meaning that plaintiff has terminated a life of something or someone that was previously living," *id.* at 1014. As a result, it was not a verifiable defamatory statement of fact but instead described the protestor's "opinion of the results of an abortion procedure." *Id.* at 1014.

The same is true here: a reasonable person hearing a claim of murder in the context of the abortion debate would not assume, as do the plaintiff organizations, that a criminal accusation was being made. Instead, they would understand that the speaker believed that abortion kills another human being, even if it is not prohibited by the law. Holding otherwise could condemn as defamatory an untold number of statements made during the *Roe* era and any similar statements made by Texans in the future were the law to change to permit elective abortion in the State.

### 2. The claim that abortion is murder because it kills another human being is not verifiably false.

The statement that abortion is murder, that is, the deliberate killing of another human, is not verifiably false and cannot form the basis of a defamation claim. Facts about human development and the abortion procedure itself indicate that abortion ends a human life. Laws protecting unborn life show it is reasonable to believe that unborn life should not be ended. And court precedent has always respected the positions of those opposing abortion.

#### a. Human development

Twenty-five years ago, Justice Gonzalez declared that "[b]ecause of advances in medical technology, it is no longer debatable that life begins before birth." *Edinburg Hosp. Auth. v. Trevino*, 941 S.W.2d 76, 87 (Tex. 1997) (Gonzalez, J., dissenting). Citing medical textbooks, he firmly concluded that "under contemporary scientific standards, it is beyond dispute that a fetus is a human being from the moment of conception." *Id.* He was correct.

Texas's Right-to-Know pamphlet provides a description of the unborn child from conception through birth. *A Woman's Right to Know*, Tex. Health & Humans Servs. Comm'n, https://www.hhs.texas.gov/sites/default/files/documents/services/health/women-children/womans-right-to-know.pdf. At conception, all of the genetic material necessary for the child to fully develop is present. *Id.* at 2. At six weeks' gestation, the child has a heartbeat, the beginnings of major organs, and arm and leg buds. *Id.* At ten weeks, the child begins to move and brain activity can be recorded. *Id.* at 3. At sixteen weeks, the child is almost five inches from head to bottom, and at twenty weeks, he can hear and respond to noise. *Id.* at 4-5.

Consequently, to the extent a claim of murder requires the death of a human being, evidence of human development prevents the Court from concluding that the unborn are not living human beings as a matter of verifiable fact.

**b. Nature of the abortion procedure**

Abortion also prematurely ends the development of an unborn child. First-trimester abortions are typically accomplished through medication or suction curettage. *Gonzales*, 550 U.S. at 134. Medication abortion is a two-step process where the first medication results in separating the embryo and placenta from the uterine wall, and the second medication induces contractions to expel them. *Am. Coll. of Obstetricians & Gynecologists v. U.S. Food & Drug Admin.*, 472 F. Supp. 3d 183, 190 (D. Md. 2020). Suction curettage, or vacuum aspiration, involves vacuuming out the contents of the uterus (including the unborn child). *Gonzales*, 550 U.S. at 134; *see also A Woman's Right to Know*, *supra*, at 16.

When the unborn child becomes too large to suction out of the uterus, doctors typically use the dilation-and-evacuation procedure, *Stenberg*, 530 U.S. at 924, which Texas has termed a dismemberment abortion, Tex. Health & Safety Code § 171.151. As the name indicates, dismemberment abortions involve using forceps to pull the unborn child out piece by piece until the doctor is left with "a tray full of pieces." *Stenberg*, 530 U.S. at 958-59 (Kennedy, J., dissenting). The unborn child "can survive for a time while its limbs are being torn off," but eventually the child "dies just as a human adult or child would: It bleeds to death as it is torn limb from limb." *Id.*

The option of partial-birth abortion requires delivering the body of the unborn child but, before the head is delivered, piercing the skull and vacuuming out the child's brains, crushing the skull, or decapitating the child. *Gonzales*, 550 U.S. at 138-39. Doctors who performed this procedure testified that they took measures to "ensure the fetus [wa]s dead" because a fetus with "some viability" is always a "difficult situation." *Id.* at 139-40. Finding a "disturbing similarity to the killing of a newborn infant," *id.* at 158, Congress banned the procedure, 18 U.S.C. § 1531(a), and Texas followed suit, Tex. Health & Safety Code § 171.102(a).

Given these facts, it is entirely reasonable that some wish to describe these procedures, performed on living unborn children, with words such as "kill" or "murder." At the very least, the scientific facts of fetal development and the procedures used to cut that development short prohibit this Court from concluding that the statement that "abortion is murder" is verifiably false.

### c. Laws protecting the unborn from harm

Texas and other States have often protected unborn life, giving credence to the view that abortion ends an unborn life. Criminal prohibitions on abortion in Texas preexist Texas's statehood. The first criminal penalties were enacted in 1854 and punished with up to ten years hard labor the procurement of "the miscarriage of any woman being with child" by use of poison or an instrument. Act of Feb. 9, 1854, 5th Leg., R.S., ch. 49, § 1, 1854 Tex. Gen. Laws 58, 58. A similar prohibition was then included in the original Penal Code adopted in in 1856, which also prohibited furnishing the means of procuring an abortion. 1856 Tex. Penal Code arts. 531-36 (adopted by the 6th Leg., R.S.). Similar provisions have remained in Texas's codes since then. 1879 Tex. Penal Code arts. 536-41 (adopted by the 16th Leg., R.S.); 1895 Tex. Penal Code arts. 641-46 (adopted by the 24th Leg., R.S.); 1911 Tex. Penal Code arts. 1071-76 (adopted by the 32d Leg., R.S.); 1925 Tex. Penal Code arts. 1191-96 (adopted by the 39th Leg., R.S.); Tex. Rev. Civ. Stat. arts. 4512.1-.6. And during the last legislative session, the Texas Legislature reaffirmed that performing an elective abortion subjects a doctor to criminal and civil penalties. Tex. Health & Safety Code ch. 170A.

Further protecting unborn life, Texas law makes intentionally or knowingly causing the death of an individual punishable as murder, Tex. Penal Code § 19.02(b)(1), and defines an "[i]ndividual" in the Penal Code to include "an unborn child at every stage of gestation from fertilization until birth," *id.* § 1.07(a)(26). And while the Penal Code contains an exception for "lawful medical procedure[s]" that are intended to cause the death of an unborn child, *id.* § 19.06(2), the statute

otherwise protects all unborn life. At least thirty-seven other States have similar fetal homicide laws, with twenty-eight of those States applying them from conception forward. *State Laws on Fetal Homicide and Penalty-enhancement for Crimes Against Pregnant Women*, Nat'l Conf. of State Legislatures (May 1, 2018), https://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx.

Tort law also includes obligations not to harm unborn life: "[s]o far as duty is concerned, if existence at the time of the tortious act is necessary, medical authority has long recognized that an unborn child is in existence from the moment of conception." W. Page Keeton, et al, *Prosser and Keeton on Torts* § 55, at 367 (5th ed. 1984) (footnote omitted). Texas law permits the recovery in a wrongful death cause of action for the death of an unborn child. Tex. Civ. Prac. & Rem. Code §§ 71.001(4), 71.002(a). The Texas Family Code also holds parents responsible for conduct that occurs before the child's birth. *E.g.*, Tex. Fam. Code § 161.001(b)(1)(H) & (R) (abandoning child before birth and causing child to be born addicted to drugs are grounds for parental termination); *see also In re J.W.*, 645 S.W.3d 726, 749-50 (Tex. 2022) (holding that endangerment of an unborn child can contribute to parental termination).

Thus, if the question is whether abortion is murder because it kills an unborn child, Texas laws concerning the unborn in a variety of contexts prohibit a conclusion that such a statement is verifiably false. Texas law treats unborn children as lives to be protected.

#### d. Precedent respecting pro-life positions

Although not using the term "murder," the Supreme Court has described the abortion debate in terms of the life and death of unborn children, recognizing that some find abortion to be "nothing short of an act of violence against innocent human life." *Casey*, 505 U.S. at 851-52. Further, "[m]illions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child." *Stenberg*, 530 U.S. at 920. And again, "[s]ome believe fervently that a human person comes into being at conception and that abortion ends an innocent life." *Dobbs*, 142 S. Ct. at 2240. That Court has never suggested that the pro-life position is unsupported by facts or otherwise not worthy of respect.

* * *

The claim that abortion is murder may be strongly worded, but in context, it is not verifiably false. The position that abortion kills unborn human beings is supported by facts about human development, the nature of the abortion procedure, other laws protecting unborn life, and precedent. The Court should not limit the debate about abortion by concluding, as a matter of law, that such statements are verifiably false and punishable as defamation.

### C. That Dickson believes abortion is murder does not make his statements actionable.

The Lilith Fund admitted in its court of appeals' briefing that "[g]enerally calling abortion 'murder' alone is not defamatory." *Lilith Fund*, 647 S.W.3d at 416 n.7. It has walked back that position somewhat in this Court, claiming only that it has never argued that any person who calls abortion murder is liable for defamation.

Lilith Fund Pet. Br. 34. But there is no way to draw a principled line between Dickson's use of the word "murder" and the unspecified hypothetical contexts in which the Lilith Fund would not object to its use. Principles of free speech, *see supra* pp. 2-5, mean that members of the public should not have to worry whether abortion providers or groups like the plaintiff organizations will take offense at the use of the word "murder" in debates about abortion in this State. Were the Court to declare that Dickson's statements about abortion are verifiably false statements of fact, that holding would not remain confined to these specific circumstances.

The plaintiff organizations' other argument—that Dickson's statements are not opinions because Dickson believed them to be true and intended others to believe them, too, Lilith Fund Pet. Br. 17-21; Afiya Resp. Br. 39-43—would swallow the constitutional protection of opinion. To hold an opinion is to believe it to be true, and to express an opinion is to want others to believe the same thing. *See, e.g.*, *Opinion*, Merriam-Webster's, *supra* (defining "opinion" as "a view, judgment, or appraisal formed in the mind about a particular matter"). As the Seventh Court of Appeals explained, "[a] person outside an abortion clinic yelling that those inside are 'murderers' no doubt believes and wants others to believe that terminating a fetus' viability is intentionally killing a human life, i.e., murder." *Lilith Fund*, 647 S.W.3d at 418. But for purposes of defamation, "the focus is not on what the speaker intended but what a reasonable person would believe, given the context involved." *Id.*

The plaintiff organizations' position would give less protection to strongly held opinions and views that an individual truly believes are correct. Thus, eliminating from constitutional protection statements that "a reader would think the speaker

intended to be believed," Lilith Fund Pet. Br. 18, would eliminate constitutional protections for anything other than the expression of opinions one did not actually hold.

That is why, when determining whether a statement is one of fact or opinion, the Court has focused on (1) whether a statement is verifiably false, and (2) its context. *Dallas Morning News*, 554 S.W.3d at 639. As explained above, the statement that abortion is murder is not verifiably false, but instead supported by a wide variety of facts. And the context of Dickson's statements, the debate surrounding abortion, would let the reasonable person know that Dickson believes abortion deliberately ends an unborn life. The Court should not declare any words off limits but allow the debate to play out so that government may respond to the will of the people on this issue. *See Stromberg*, 283 U.S. at 369.

## III. *Roe v. Wade* Did Not Limit the Scope of Permissible Speech About Abortion.

Even if the enforceability of Texas's abortion statutes was dispositive of the defamation question, Dickson's statements cannot form the basis of a defamation claim. A declaration that a law is unconstitutional does not limit the ability of private citizens to state that someone has violated it. And the statutes that the parties are arguing about—the laws that *Roe* declared unconstitutional, Tex. Rev. Civ. Stat. arts. 4512.1-.6—should never have been declared unconstitutional in the first place. They are enforceable under both the federal and state constitutions. Thus, they provide a legal basis for Dickson's statements, to the extent he needs one.

### A. The public is not obligated to speak as if unconstitutional laws do not exist.

These cases provide an opportunity for the Court to clarify its prior statements that an unconstitutional law is "'void from its inception . . . as if it had never been,' and 'is to be considered no statute at all.'" *Ex parte E.H.*, 602 S.W.3d 486, 494 (Tex. 2020) (quoting *Smith v. State*, 463 S.W.3d 890, 895 (Tex. Crim. App. 2015)). The plaintiff organizations assert that the statutes that were declared unconstitutional in *Roe* must be treated as if they never existed and, therefore, could not form the basis of any belief that abortion is unlawful. Lilith Fund Pet. Br. 11-12 n.4 (citing, *inter alia*, *Ex parte E.H.*, 602 S.W.3d 486, and *In re Lester*, 602 S.W.3d 469 (Tex. 2020)); Afiya Resp. Br. 8-9 (same). But while declarations of unconstitutionality may limit governmental actions, they do not limit speech.

Statutes that are declared unconstitutional do not, as a matter of historical fact, cease to exist. Thus, the conclusion that an unconstitutional statute "never existed," *Ex parte E.H.*, 602 S.W.3d at 494, is a legal fiction, that is, "[a]n assumption that something is true even though it may be untrue . . . to alter how a legal rule operates," *Legal fiction*, Black's Law Dictionary (11th ed. 2019). *See also Ex parte E.H.*, 602 S.W.3d at 498 n.1 (Blacklock, J. dissenting). As this Court explained, "[w]hen a court declares a law unconstitutional, the law remains in place unless and until the body that enacted it repeals it, even though the government may no longer constitutionally enforce it." *Pidgeon v. Turner*, 538 S.W.3d 73, 88 n.21 (Tex. 2017). And courts do not repeal laws. It would be a violation of separation of powers for them to attempt to do so. Tex. Const. art. II, § 1.

A declaration that a statute is unconstitutional merely prevents the imposition of legal consequences for violating the statute or the enforcement of rights granted under it. Thus, in *Ex parte E.H.*, the petitioner was entitled to expunction of his arrest record when the underlying criminal statute was declared unconstitutional. 602 S.W.3d at 488-89. The defendant in *Smith* was entitled to an acquittal. 463 S.W.3d at 897. The defendant in *Reyes v. State* did not have a speedy-trial claim after the Speedy Trial Act was declared unconstitutional. 753 S.W.2d 382, 384 (Tex. Crim. App. 1988). And the applicants in *Ex parte Fournier* were entitled to habeas relief when the statute under which they were convicted was declared unconstitutional. 473 S.W.3d 789, 796 (Tex. Crim. App. 2015).

But a conclusion that a statute is unconstitutional does not obligate members of the public to speak as if the statute never existed or the person never violated it. A private citizen can accuse someone who falsely claims to have received a Congressional Medal of Honor of "stealing" valor, even though that statute was declared unconstitutional. *United States v. Alvarez*, 567 U.S. 709, 715 (2012) (plurality op.). The public can shun individuals who make "animal cruelty" videos even though the law criminalizing the videos failed a First Amendment challenge. *United States v. Stevens*, 559 U.S. 460, 467 (2010). And the public does not have to pretend that the defendants in *E.H.*, *Lester*, and *Fournier* never communicated in a sexually explicit manner with a minor. Indeed, the Court has recognized that there is a difference between the "historical reality" of what happened and the "legal reality" of how the courts must treat those actions. *Ex parte E.H.*, 602 S.W.3d at 490. Individuals may choose to speak based on "historical reality" rather than "legal reality."

Thus, while Dickson correctly argues that the decision in *Roe* did not erase the preexisting statutes that prohibit abortion, the larger point remains that the public does not have to speak as if *Roe* erased Texas law. While *Roe* may have compelled courts to dismiss any attempted prosecutions, *Roe* did not prevent people from stating what was otherwise true—that performing elective abortions and furnishing the means to do so violates Texas law.

### B. Texas's pre-*Roe* laws are constitutional.

Even if the Court believes that the truth or falsity of Dickson's statements hinges on whether the pre-*Roe* statutes were constitutional (and thus continued to exist), Dickson should still prevail here. Beginning with historical reality, the Texas Legislature enacted abortion prohibitions that were declared unconstitutional in *Roe*. Tex. Rev. Civ. Stat. arts. 4512.1-.6. And the Supreme Court has since concluded that the *Roe* decision was wrong from the day it was decided. *Dobbs*, 142 S. Ct. at 2265. Thus, the statutes should never have been declared unconstitutional. And as the Texas Legislature has subsequently confirmed, they have never been repealed. Act of May 25, 2021, 87th Leg., R.S., ch. 800, § 4, 2021 Tex. Sess. Law Serv. 1887; Act of May 13, 2021, 87th Leg., R.S., ch. 62, § 2, 2021 Tex. Sess. Law Serv. 125.

Further, there is no reason to believe that the pre-*Roe* statutes are otherwise unconstitutional now. *Dobbs* made clear that the United States Constitution poses no bar to statutes that seek to protect unborn life by prohibiting abortion. *Dobbs*, 142 S. Ct. at 2284. States have "legitimate interests" in the "respect for and preservation of prenatal life at all stages of development." *Id.* (citing *Gonzales*, 550 U.S. at 157-58); *see also Casey*, 505 U.S. at 846 (recognizing States' "legitimate interests

from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child"). The Court had no difficulty concluding that Mississippi's ban on abortions after 15-weeks' gestation was rationally related to Mississippi's legitimate interest in protecting the life of the unborn. *Dobbs*, 142 S. Ct. at 2284. The same holds for Texas's pre-*Roe* laws that protect unborn life by prohibiting abortion.

The Texas Constitution does not impose a constitutional bar, either. There is no text in the Texas Constitution that refers to abortion or creates a right to abortion. And were anyone to argue that the Texas Constitution's due-course guarantee includes a right to abortion, Tex. Const. art. I, § 19, that argument would fail. Although it is an open question whether that clause creates substantive rights, *see Tex. Dep't of State Health Servs. v. Crown Distrib. LLC*, 647 S.W.3d 648, 670 (Tex. 2022) (Young, J., concurring), even if it does, abortion is not one of them.

The Court's goal when interpreting the Texas Constitution is to give effect to the plain meaning of the text as it was understood by those who ratified it. *Sears v. Bayoud*, 786 S.W.2d 248, 251 (Tex. 1990). When conducting that analysis, the "[l]egislative construction and contemporaneous exposition of a constitutional provision is of substantial value." *In re Abbott*, 628 S.W.3d 288, 293 (Tex. 2021) (orig. proceeding) (quoting *Am. Indem. Co. v. City of Austin*, 246 S.W. 1019, 1023 (Tex. 1922)). Nothing in Texas's history suggests that the framers of the Texas Constitution intended the due-course provision in section 19 to create a right to abortion.

As previously noted, Texas has prohibited abortion since 1854—before the current Constitution was even adopted. *See supra* p. 17. And Texas secured multiple convictions for violations of those statutes. *E.g.*, *Reum v. State*, 90 S.W. 1109, 1112

(Tex. Crim. App. 1905); *Moore v. State*, 40 S.W. 287 (Tex. Crim. App. 1897); *Willingham v. State*, 25 S.W. 424 (Tex. Crim. App. 1894). Further, in 1840, Texas adopted the common law of England to the extent it was not inconsistent with the Texas Constitution or statutes. Act approved Jan. 20, 1840, 4th Cong., R.S., § 1, 1840 Repub. Tex. Laws 1, 3, *reprinted in* 2 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 177-78 (Austin, Gammel Book Co. 1898). As detailed by the Supreme Court in *Dobbs*, the common law of England did not recognize a right to abortion. 142 S. Ct. at 2249-51. Thus, there is no evidence that a historical understanding of the Texas Constitution included the right to abortion. Instead, the procedure was criminalized and prosecuted until *Roe* required otherwise.

Nor does the due-course guarantee contain a right to privacy that would include abortion. Faced with a claim that the due-course guarantee in section 19 provided a right to privacy that included adultery, the Court looked again to text, history, and prior decisions to determine the framers' intent. *City of Sherman v. Henry*, 928 S.W.2d 464, 472 (Tex. 1996). Finding no text but almost a century of criminalizing adultery, the Court concluded that adultery was "not a right implicit in the concept of liberty in Texas or deeply rooted in this state's history and tradition." *Id.* at 473.

The same holds for abortion for all of the reasons explained above—there is no textual support for the right in the Texas Constitution; a right to abortion was not part of the common law that was adopted; and the Texas Legislature has prohibited abortion before and after the Constitution was adopted.

Consequently, courts would judge any claim that the pre-*Roe* statutes violated the Texas Constitution under the rational-basis test. *See, e.g.*, *Barshop v. Medina*

*Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 633 (Tex. 1996); *City of San Antonio v. TPLP Office Park Props.*, 218 S.W.3d 60, 65 (Tex. 2007) (per curiam). Because Texas has an interest in the protection of unborn life, *Dobbs*, 142 S. Ct. at 2284, and the pre-*Roe* statutes further that interest by prohibiting anyone from ending that life, the statutes are constitutional.

Thus, regardless of whether the Court considers "murder" as the killing of a human being or as a specific crime, Dickson's statements were not verifiably false. The plaintiff organizations' defamation claims fail at the initial prima facie step. Both lawsuits should be dismissed.

## PRAYER

The Court should reverse the judgment of the Fifth Court of Appeals but affirm the judgment of the Seventh Court of Appeals.

Respectfully submitted.

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